

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 99-O-04**

DATE ISSUED: April 22, 1999

ISSUED TO: Gregory Lange, Hazen City Attorney

CITIZEN'S REQUEST FOR OPINION

On March 17, 1999, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Bismarck Tribune editor Tim Fought asking whether the City of Hazen violated N.D.C.C. §§ 44-04-19 and 44-04-19.2 by holding an executive session which went beyond the scope of the announced legal authority for the executive session and by failing to fully comply with required statutory procedures for holding an executive session.

FACTS PRESENTED

On March 3, 1999, the Hazen City Commission held an executive session for "attorney consultation" during its regular meeting. After a person attending the open meeting asked for further explanation of the reason for the executive session, the city attorney responded that the "attorney consultation" pertained to "potentially pending legal matters, lawsuits, both civil and criminal."

The executive session lasted thirty-four minutes and was attended by all city commissioners, the city auditor, the city attorney, and the city chief of police. The executive session was tape recorded, in compliance with N.D.C.C. § 44-04-19.2(5), and has been reviewed by this office. The recording also included the portion of the open meeting during which the Commission voted to have an executive session. After this opinion was requested, the Commission adopted revised minutes and disclosed almost all of the recording.

ISSUES

1. Was the executive session of the Hazen City Commission on March 8 authorized by law and limited to the topics and legal authority announced during the open portion of the meeting?

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2. Did the Hazen City Commission comply with the procedural requirements for holding an executive session in N.D.C.C. § 44-04-19.2?

ANALYSES

Issue One:

A gathering of a quorum of the members of a city commission is a meeting required to be open to the public unless otherwise specifically provided by law. N.D.C.C. §§ 44-04-19, 40-06-02. See generally 1998 N.D. Op. Att'y Gen. O-56, 1998 N.D. Op. Att'y Gen. O-45, 1996 N.D. Op. Att'y Gen. 38. If a specific statutory exception applies, a public entity must identify that legal authority before closing a portion of its meeting to hold an executive session. N.D.C.C. § 44-04-19.2(2)(b), 1998 N.D. Op. Att'y Gen. O-1.

The portion of a meeting during which "attorney consultation" occurs may be closed to the public. N.D.C.C. § 44-04-19.1(2).

"Attorney consultation" means any discussion between a governing body and its attorney in instances in which the governing body seeks or receives the attorney's advice regarding and in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings or concerning pending civil or criminal litigation or pending adversarial administrative proceedings. Mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation.

N.D.C.C. § 44-04-19.1(4). Because "attorney consultation" was the only reason announced by the Commission for holding an executive session, any discussion during the executive session on March 3 which did not constitute "attorney consultation" was required to be held in an open meeting. See Letter from Attorney General Nicholas Spaeth to Michael McIntee (Sep. 19, 1991).

The law is clear, and this office has reiterated on several occasions, that discussion at a meeting between a governing body and its attorney is not per se "attorney consultation" under N.D.C.C. § 44-04-19.1. See, e.g., 1998 N.D. Op. Att'y Gen. at O-2, 1998 N.D. Op. Att'y Gen. O-66. For discussion between a governing body and its attorney to be "attorney consultation," the discussion

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must be directly related to the pending or reasonably predictable litigation. 1998 N.D. Op. Att'y Gen. at O-68. "A simple update by the governing body's attorney on the status of pending or reasonably predictable litigation would usually not be sufficient, unless the update includes the attorney's mental impression, litigation strategy, or advice regarding the litigation." 1998 N.D. Op. Att'y Gen. at O-2, O-3.

Another open meetings exception in N.D.C.C. § 44-04-19.1, for negotiation strategy sessions, expressly provides that the exception may be invoked only if holding the discussion in an open meeting (which could be attended by the other party to the litigation or negotiation) would have an adverse fiscal effect on the bargaining or litigating position of the public entity. N.D.C.C. § 44-04-19.1(7). The definition of "attorney consultation" does not expressly include a similar requirement. However, the line between a discussion of the status or underlying facts of a pending or reasonably predictable proceeding or litigation (which is required to be open) and "attorney consultation" regarding that litigation (which may be closed) will frequently be drawn at the point where the public entity's bargaining or litigation position would be adversely affected if the discussion occurred in an open meeting.¹

The recording reveals that the main purpose of the executive session was to discuss a particular situation. At the time the meeting was held, it was reasonable to believe that civil litigation, criminal litigation, or both, regarding that situation was reasonably predictable and would involve the City of Hazen. Thus, the portion of the executive session which was directly related to the City Commission's receipt and consideration of the city attorney's advice regarding the potential litigation was properly closed to the public.

The discussion began with an update by the commission president on the status of the situation and what had occurred up to that time. This is precisely the type of update on the facts of a situation or the status of litigation which is not included under "attorney consultation" and should have occurred in the open portion of the meeting.

¹ For example, there would be no adverse affect, and the "attorney consultation" exception would not support closing a meeting, if a governing body meets with the other side to the pending or reasonably predictable litigation or administrative proceeding.

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Following the update, the president called on the city attorney to explain what the Commission should do next, and the city attorney discussed the potential civil action which may occur. This portion of the executive session concluded with the president stating his position on what the Commission should do regarding the potential civil action. This part of the meeting was properly closed.

Because the rest of the recording has been disclosed, it is not necessary to summarize in detail the remaining discussion during the executive session. Some of the discussion pertained to a criminal investigation which, at least at the time the executive session was held, could reasonably be expected to lead to a criminal proceeding involving the City and therefore could be held in executive session. However, much of the remaining discussion, like the beginning of the executive session, was not directly related to the litigation and would not have harmed the litigation position of the city if it was held in an open meeting. The references to litigation or closed records in the Commission's March 3 executive session were minimal at best. The vast majority of the session consisted of general discussion to bring all the members of the Commission up to speed on an important item of public business rather than receipt and consideration of the city attorney's advice regarding specific pending or reasonably predictable litigation arising out of that situation.

It would be extremely impractical to conclude that every remark during an executive session under N.D.C.C. § 44-04-19.1 which is irrelevant to the pending or reasonably predictable litigation is a violation of the open meetings law. However, in this case, meaningful discussion about public business occurred in an executive session which did not fall under any exception to the open meetings law. It is my opinion that holding these parts of the discussion in an executive session violated N.D.C.C. § 44-04-19.

II.

The fact that a governing body of a public entity is holding an executive session cannot be kept a secret. Rather, before going into executive session, the governing body must convene in an open meeting, preceded by public notice, and announce both the legal authority for the session and the general topics that will be discussed or considered. N.D.C.C. § 44-04-19.2(2)(b). The City indicated it was closing the meeting for "attorney consultation," but it did not indicate that the subject of that consultation was

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reasonably predictable criminal and civil litigation until asked by a reporter attending the meeting.²

Where a governing body recites the applicable statutory language of an open meetings exception, like the Commission did in this case, the announcement of an executive session under N.D.C.C. § 44-04-19.2 need not cite the statute or reveal information which is closed or confidential. See N.D.C.C. § 44-04-19.2(4) (minutes of executive session must include summary of general topics of discussion which does not disclose any closed or confidential information). However, the requirements in N.D.C.C. § 44-04-19.2(2) are worded in the conjunctive; a public entity must announce both the legal authority and the topics to be considered. A public entity does not fulfill these requirements simply by quoting or citing the applicable open meetings exception. More information must be provided about the subject of the executive session. In this case, the City should have announced that the reasonably predictable litigation it was going to consider pertained to the particular factual situation addressed in the executive session. Such an announcement would not have disclosed any closed or confidential information, but would have kept the public apprised of the reason for the executive session. It is my opinion that the City violated N.D.C.C. § 44-04-19.2 by failing to provide more information about the topics to be discussed during its March 3 executive session.

CONCLUSIONS

1. It is my opinion that the Hazen City Commission violated N.D.C.C. § 44-04-19 by holding an executive session on March 3 which went beyond the scope of "attorney consultation" under N.D.C.C. § 44-04-19.1.
2. It is my opinion that the Hazen City Commission violated N.D.C.C. § 44-04-19.2 by failing to announce the topics to be discussed during its executive session on March 3.

STEPS NEEDED TO REMEDY VIOLATIONS

² Exempt records may be discussed in an executive session, N.D.C.C. § 44-04-19.2(1), but that was not announced as a legal basis for the executive session held on March 3.

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The City remedied its violation of N.D.C.C. § 44-04-19 by providing the Bismarck Tribune with a copy of the recording of the portions of the March 3 executive session which should have been held in an open meeting, along with portions of the recording which were properly held in executive session. This disclosure also remedied, to the greatest extent possible, the deficiencies in the City's announcement of the topics to be considered during the executive session. The minutes should also be amended to include the topic discussed during the executive session.

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ATTORNEY GENERAL

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